

On November 29, 1982 appellant's husband, a 29-year-old janitor, injured his lower back while in the performance of duty. He filed a claim for benefits, which the Office accepted for

herniated disc at L4-5. The Office paid appellant appropriate compensation for temporary total disability and placed him on the periodic rolls.

On July 31, 2002 appellant's husband died of natural causes, unrelated to his work injury. The Office, however, continued to make direct deposit compensation payments to the joint account of appellant and the deceased.

By letter dated February 25, 2004, Washington Mutual Bank informed appellant that a reclamation request had been received from the U.S. Treasury Department because of an overpayment by the Department of Labor of compensation benefits in the amount of \$33,531.43 to her account after the recipient's death.

By letter dated March 5, 2004, appellant's attorney informed appellant's bank, Washington Mutual, that appellant had no funds to pay any portion of the reclamation it had requested.¹ Accompanying his letter was what he purported was a copy of an August 16, 2002 letter appellant allegedly sent to the Office after her husband died. In his letter to Washington Mutual, appellant's attorney stated:

“[Appellant's husband] died July 31, 2002. [Appellant] notified the U.S. Department of Labor of her husband's death by letter dated August 16, 2002. See the attached copy. The payments continued. [Appellant], as the surviving spouse, did not question her right to the continued payments. I have sent a letter to the Department of Labor requesting information about [appellant's] eligibility for survivors' benefits.”²

The letter was received by the Office on March 11, 2004; however, there is no documentation in the record indicating that appellant mailed this letter or that the Office accepted the letter at any time around August 16, 2002. The record contains no prior copy of the letter.

By letter dated October 14, 2004, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$33,531.43, covering the period August 1, 2002 through January 24, 2004. The Office found that appellant was at fault in creating the overpayment because she continued to receive compensation from the Office following her husband's death on July 31, 2002, despite the fact that his death was not work related. The Office stated that there was no record of it ever having received the August 16, 2002 letter of notification from appellant; moreover, she had failed to

¹ The letter from appellant's attorney indicated that appellant had received a February 25, 2004 letter from Washington Mutual stating it was attempting to reclaim the sum of \$33,531.43 from her checking account. This represented the total amount of compensation she had received from the Office since July 31, 2002, when her husband died. The funds, however, were not available in the checking account to which the compensation checks had been directly deposited, as appellant had withdrawn and spent these funds.

² Upon learning that appellant was still receiving her husband's compensation after his death, the Office contacted the U.S. Attorney's Office and made a fraud referral, requesting an investigation of the disposition of the compensation payments issued to appellant's husband subsequent to his death in July 31, 2002 through January 2004. The U.S. Attorney's Office declined to pursue criminal prosecution because there was no way to prove beyond a reasonable doubt that appellant did not submit the letter of notification on August 16, 2002 as alleged or that the Office received and failed to act on it.

respond to the two CA-1032 forms the Office sent her to her husband's address in March 2003 and on January 5, 2004. The Office stated that, in light of the Office's submission of the CA-1032 forms, she should have known that the Office was unaware of her husband's death. The Office found that, if she believed she was entitled to the compensation checks, she should have reasonably known it was necessary to continue to complete and submit the forms to receive compensation, as her husband had been on the periodic rolls and had been receiving compensation for total disability since June 1983. Based on these facts, the Office concluded that appellant was at fault in creating the overpayment of compensation in the amount of \$33,531.43. The Office informed appellant that, if she disagreed with the decision she could, within 30 days, submit evidence or argument to the Office, or request a prerecoupment hearing with the Branch of Hearings and Review. The Office further informed appellant that she should submit a detailed explanation of her reasons for seeking waiver, fully complete and submit the enclosed overpayment recovery questionnaire and attach any supporting documents in her possession. The Office specifically requested that appellant submit any relevant financial documents, including income tax returns, bank account statements, bills and canceled checks reflecting payments, pay slips and other records to support income and expenses listed on the enclosed questionnaire. The Office also noted that, pursuant to 20 C.F.R. § 10.438, the failure to furnish the financial information requested on the questionnaire within 30 days would result in a denial of waiver of the overpayment, and that no further request for waiver would be considered until the requested information was furnished.

On November 8, 2004 appellant's attorney requested a prerecoupment hearing. Appellant also requested a waiver of recovery of overpayment on October 25, 2004, claiming that she was without fault for the overpayment. In addition, she claimed that recovery of the overpayment would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. Appellant subsequently submitted a completed Form OWCP-20 outlining her income and assets as well as her household expenses and debts, plus checks and financial statements documenting her statements.

The recoupment hearing was held on May 19, 2005; appellant was represented by an attorney. She stated that when her husband died she mailed the August 16, 2002 letter to the Office, with the enclosed certificate of death, notifying the Office of his death. Appellant stated that, when she received no response to her letter from the Office, she assumed she was entitled to the compensation checks she continued to receive because he had served in the Navy. She asserted that she believed that the checks constituted a form of retirement compensation.

In a decision dated August 4, 2005, the hearing representative affirmed the October 14, 2004 decision which found that appellant was at fault in creating the overpayment of compensation in the amount of \$33,531.43 for the period August 1, 2002 through January 24, 2004. The hearing representative stated that the absence in the record of a prior copy of the August 16, 2002 letter was not conclusive evidence that appellant failed to notify the Office of her husband's death. He found, however, that she demonstrated a lack of diligence in failing to make additional inquiries to the Office when she continued to receive compensation checks after sending the August 16, 2002 letter. The hearing representative did not accept appellant's contention that she made no further efforts to contact the Office because she did not

have the proper address or telephone number. The hearing representative stated that appellant possessed sufficient awareness and education to question whether she was entitled to the compensation checks following her husband's death. He therefore found that she should have been reasonably aware that she was not entitled to receive these checks. Based on the above evidence of record, the hearing representative concluded that appellant was not without fault in the creation of the overpayment, and that therefore recovery of the overpayment could not be waived.

The hearing representative also found that recovery of the overpayment, and any applicable interest, in the amount of \$75.00 per month, would not deprive appellant of income required to meet ordinary and necessary living expenses. The hearing representative stated that appellant listed \$1,200.00 in monthly income on the overpayment recovery questionnaire, and had regular necessary and reasonable monthly expenses exceeding \$1,160.00, and therefore had the capacity to pay at the stated rate. The hearing representative therefore concluded that monthly payments of \$75.00 to recover the overpayment benefits would allow the Office to recover the overpayment in a reasonable manner while at the same time minimizing any financial hardship on appellant.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to the Office's regulations at 20 C.F.R. § 10.500, the Act benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury. Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Actions, *Identification of Overpayment*, Chapter 6.200.4(c)(3) (September 1994), an overpayment of compensation may occur when an individual is determined to be not entitled to compensation already paid.

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period August 1, 2002 through January 24, 2004. The record shows that appellant received an overpayment during the period in question because she continued to receive her husband's checks for temporary total disability compensation after his death on July 31, 2002. The Office calculated the \$33,531.43 overpayment by totaling the amount of 19 temporary total disability compensation checks appellant received during the period August 1, 2002 through January 24, 2004, based on monthly payments of \$1,653.00 from August 1, 2002 to April 2003, and monthly payments of \$1,693.00 from April 18, 2003 to January 23, 2004.³ Based on this determination, the Office properly found that appellant received an overpayment of compensation during that period.

³ The Office issued a \$31.43 cost-of-living adjustment on April 14, 2003, and increased the monthly payments to \$1,693.00 as of April 18, 2003.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁴ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁵

In determining whether an individual is with fault, section 10.433(a) of the Office’s regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”⁶

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Upon appellant’s husband’s death she had a duty to inform the Office of his death. Because her husband’s death was not work related, and because she was not entitled to death or survivor’s benefits, appellant knew or should have known that she was not entitled to the amount of monthly compensation from the Office that her husband had been receiving. Upon her receipt of the first direct deposit in the amount of \$1,653.00 for the monthly period commencing August 1, 2002, fault may not be imputed because appellant would not necessarily have known of the pending payment before receipt. However, after the initial payment it could be presumed

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁶ 20 C.F.R. § 10.433(a).

that she knew she was not entitled to the amount of compensation contained in subsequent direct deposit checks.⁷ Therefore, upon learning that she continued to receive direct deposit funds from the Office, appellant had a duty to contact the Office, advise the Office of her husband's death, and inquire as to whether acceptance of this payment was appropriate. Instead, appellant accepted and did not question the direct deposit of this check and of subsequent checks totaling \$32,878.43 until January 24, 2004, when the payments were discontinued.

Appellant has alleged that she was not at fault in the creation of the overpayment because, after her husband died, on August 16, 2002, she mailed a letter to the Office with the enclosed certificate of death notifying the Office of his death. The record, however, does not contain the original August 16, 2002 letter or the death certificate. With respect to the issue of receipt, the Board has held that, in the absence of evidence to the contrary, it is presumed that a notice or document mailed in the ordinary course of business was received. This presumption has often worked in the favor of the Office when a properly addressed copy appears in the case record and the claimant denies receipt. As a rule of law, the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike. Provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing, the mailbox rule may be used to establish receipt by the Office.⁸ In this case, however, there is no evidence of proper mailing, therefore no presumption of receipt is established.

For these reasons, as appellant was not without fault under the third standard outlined above for the period commencing September 2002, recovery of the overpayment of compensation for this period may not be waived. As appellant was not at fault in the creation of the overpayment for the August 2002 direct deposit, on remand the Office shall consider waiver of this portion of the overpayment. The decision of the hearing representative dated August 4, 2005 is affirmed, as modified.

LEGAL PRECEDENT -- ISSUE 3

With regard to the method determined by the Office to recover the amount of the overpayment, section 10.441(b) of Office regulations provides:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [the Office] the amount of the

⁷ The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months, with clear knowledge that the payments are incorrect. See *George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment via direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office, or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment. In the instant case, by the time appellant accepted the September 6, 2002 check -- the second direct deposit check containing an overpayment -- a sufficient amount of time had passed for appellant to become aware of the fact that the checks contained an overpayment.

⁸ *Larry L. Hill*, 42 ECAB 596 (1991).

overpayment as soon as the error is discovered or his or her attention is called to same.... If the individual fails to make such refund, [the Office] may recover the same through any available means, including offset of salary, annuity benefits, or other federal payments, including tax refunds as authorized by the Tax Refund Offset Program, or referral to the debt to a collection agency or to the Department of Justice.”⁹

ANALYSIS -- ISSUE 3

The Board lacks the jurisdiction to determine the method of payment for the purpose of the recovery of a finalized overpayment. Section 10.441(b), cited above, gives the Office discretion to determine the method of recovery of the overpayment where an overpayment has been made to an individual who is not entitled to further payments. Further, the Board’s own case law stipulates that it does not have jurisdiction over the amount appellant is required to pay for the purpose of recovery of the overpayment when there is no further entitlement to compensation, and appellant is not in receipt of continuing compensation benefits.¹⁰ In the present case, the Board lacks jurisdiction over the method of repayment because appellant is not entitled to disability compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$32,878.43. The Board finds that the Office did not abuse its discretion in denying waiver of the overpayment commencing September 6, 2002, however, appellant was not at fault for the initial direct deposit of benefits in the amount of \$1,653.00. The Board lacks jurisdiction over the amount appellant is required to pay and the method employed for the purpose of recovery of the overpayment.

⁹ 20 C.F.R. § 10.441(b) (1999).

¹⁰ *Robert N. Vachon*, 36 ECAB 502 (1985); *Marshall L. West*, 36 ECAB 490 (1985).

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2005 decision of the Office of Workers' Compensation Programs is affirmed, as modified, and remanded for further proceedings consistent with this opinion.

Issued: October 31, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board